

**NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.** See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

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**APR 16 2009**  
COURT OF APPEALS  
DIVISION TWO

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

THE STATE OF ARIZONA,	)	
	)	
Respondent,	)	2 CA-CR 2008-0402-PR
	)	DEPARTMENT A
	)	
v.	)	<u>MEMORANDUM DECISION</u>
	)	Not for Publication
ALEXANDER GEORGE KISS,	)	Rule 111, Rules of
	)	the Supreme Court
Petitioner.	)	
_____	)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20023022

Honorable Virginia C. Kelly, Judge

REVIEW GRANTED; RELIEF DENIED

Barbara LaWall, Pima County Attorney  
By Jacob R. Lines

Tucson  
Attorneys for Respondent

Alexander G. Kiss

Florence  
In Propria Persona

PELANDER, Chief Judge.

¶1 In this petition for review, petitioner Alexander George Kiss challenges the trial court's order dismissing his notice of post-conviction relief in what appears to be his fifth post-conviction proceeding pursuant to Rule 32, Ariz. R. Crim. P., since he pled guilty in 2003 to attempted first-degree murder, aggravated assault with a deadly weapon or dangerous instrument, and sexual abuse. We will not disturb a trial court's ruling absent an abuse of its discretion. *State v. Watton*, 164 Ariz. 323, 325, 793 P.2d 80, 82 (1990). A trial court abuses its discretion when it errs in ruling on a question of law, such as whether a claim is precluded under Rule 32.2. *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007).

¶2 In its minute entry dated November 6, 2008, the trial court reviewed the chronology of Kiss's post-conviction proceedings and identified the claims Kiss had raised in those proceedings. The court then identified the following as claims Kiss had set forth in his most recent notice as those he intended to raise in this proceeding: the legality of his sentences on the ground that the statute permitting his terms to be aggravated is unconstitutional; the trial court had not found a proper aggravating circumstance existed; and trial and "appellate" counsel had been ineffective in failing previously to raise these challenges to his sentences. The court found all of Kiss's claims precluded, explaining the basis for that conclusion and noting none of the exceptions to the rule of preclusion applied to the claims Kiss intended to raise. *See* Ariz. R. Crim. P. 32.2(b). Relying on Rule 32.2(b), the court concluded summary dismissal of the notice was appropriate.

¶3 The trial court clearly identified the claims Kiss had intended to raise and correctly found those claims precluded in its November 2008 minute entry. We therefore adopt the court’s ruling. *See State v. Whipple*, 177 Ariz. 272, 274, 866 P.2d 1358, 1360 (App. 1993). Kiss has not sustained his burden on review of establishing the trial court abused its discretion. The court was correct that the claims Kiss intended to raise in this post-conviction proceeding are precluded because they were raised and resolved in prior proceedings or waived by his failure to raise them when he had the previous opportunity to do so. *See* Ariz. R. Crim. P. 32.2(a)(2), (3).

¶4 To the extent Kiss is suggesting on review that his sentence is illegal, the error is fundamental, and claims of fundamental error are excepted from the rule of preclusion, he is mistaken. As this court stated in *Swoopes*, “Not all error that is fundamental involves the violation of a constitutional right that can be waived only if the defendant personally does so knowingly, voluntarily, and intelligently.” 216 Ariz. 390, ¶ 41, 166 P.3d at 958. And, we added, “if our supreme court had intended that fundamental error be an exception to preclusion under Rule 32.2, the court presumably would have expressly said so in the rule itself.” *Id.* ¶ 42. Additionally, challenges to a sentence as either unconstitutional or illegal are cognizable under Rule 32.1(a) and (c). That those subsections are not included among the exceptions to preclusion in Rule 32.2(b), reflects the supreme court’s intent that such claims be subject to the preclusive effect of Rule 32.2(a).

¶5 We reject Kiss’s related suggestion that, in the discussion of fundamental error in our May 2006 memorandum decision, this court intimated that a claim of fundamental error with respect to sentencing may be raised in a successive post-conviction proceeding. *See State v. Kiss*, No. 2 CA-CR 2005-0340-PR, ¶ 4 (memorandum decision filed May 9, 2006). We issued that decision well before we decided *Swoopes*. Moreover, our comment must be viewed in context. We simply stated that, even if Kiss’s claim was not precluded, because he had not objected to the alleged error at sentencing, he had forfeited review for all but fundamental error. We did not create a new exception to the rule of preclusion. Finally, we find incorrect Kiss’s assertion that the trial court cannot find a claim precluded unless the state has responded to a petition and has pled and proved preclusion. The court may sua sponte find a claim precluded. Ariz. R. Crim. P 32.2(c); *see also State v. Peek*, 219 Ariz. 182, ¶ 4, 195 P.3d 641, 642 (App. 2008).

¶6 We grant Kiss’s petition for review, but because the trial court did not abuse its discretion, we deny relief.

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JOHN PELANDER, Chief Judge

CONCURRING:

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JOSEPH W. HOWARD, Presiding Judge

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PHILIP G. ESPINOSA, Judge